THE WORLD WAR AND ITS EFFECT ON FUTURE PRIVATE INTERNATIONAL LAW. II

II. The Condition of Foreigners

THE ideas which I have expressed about restrictions upon associations in their international relations indicate the nature of my opinion on the restrictions which in the future should be imposed by each nation upon foreigners.

Under the influence of philanthropic theories professed by French philosophers in the eighteenth century and for more than a hundred years, most lawmaking has had a tendency to suppress the difference which used to exist in each state between its subjects and persons who were not subjects. Particular instances are the Dutch Civil Code of 1836 and the Italian Civil Code, which in a general way class foreigners with citizens save for the single exception of political rights. The Institute of International Law made itself the mouthpiece of this liberal tendency when at Oxford in 1888 it passed a famous resolution saying that in all countries the rule should be: "The foreigner, no matter what his nationality or religion, shall have the same civil rights as the citizen."

These generous aspirations are difficult to maintain in the presence of the lesson drawn from actual events. The latter have shown that there are distinctions which must be established between the guests of a nation welcomed in its territory, that there are some such guests of a nation whose business constitutes a most serious danger, and that it is therefore imprudent to make all foreigners without exception equal in law to citizens.

Italy is a country which has for a long time professed and applied the most favorable theories toward foreigners. Moreover, it is interested in welcoming them as kindly as possible, because the money of tourists is perhaps the most important part of its revenue. But taught by the most painful lessons, and enlightened by the war, Italian public opinion has come to understand that a people may not safely let the representatives of another nation install themselves in great number, acquire houses, country estates, and

mines, and grasp, openly or secretly, its commerce, its industry, its shipping companies, and worst of all, its banks.

The cry of alarm from Italy found its voice through two eminent professors of law, Fedozzi [1] and Giovene.[2] There is no doubt that these sentiments will be echoed and that important legislation will result from it, like that which came twice in France from similar circumstances. The first was when during the drafting of the Civil Code certain articles [3] were put into it which marked a profound reaction against the too great liberality of the Revolution, and the second, when in 1849 the government of the Second French Republic found that it had to revoke its own decisions in favor of internationalism and set up against foreigners who had abused its favor procedure for their expulsion.

The experience of all times and all countries shows that it is extremely dangerous for a state to give too much liberality to foreigners who come within its boundaries. Sooner or later the fatal day comes when such imprudence is regretted, and the two phrases of La Fontaine's Fables are brought to mind:

> "*Laissez-leur prendre un pied chez vous,*
> *Ils en auront bientôt pris quatre.*" [4]

In a general way, lessons of experience and common sense both indicate that the differences between citizens and foreigners are necessary and inextinguishable. The law must take them into account, no matter what the theories of doctrinaires and Utopians.

In every country citizens can be kept in the right way by moral considerations much more forcibly than by the fear of punishment through the law. While one may hope to escape the consequences of the law, it is difficult to avoid the reproaches of one's relatives and friends, or to be surrounded by fellow citizens who do not trust one. Living in the place where one is born or has always lived, one must always hesitate before making trouble. No similar sentiment affects foreigners. None of these moral barriers hold them back when they start on the road to crime. And thus it

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[1] 18 REVUE SCIENTIA DE ROME, 419 (1915).

[2] 15 RIVISTA DI DIRITTO COMMERCIALE, 657 (1917). See also Bartolo Balotti NUOVA AUTOLOGIA (May 1, 1917), 80.

[3] Articles 11, 14, 18, 726, 912.

[4] LA FONTAINE, LA LICE ET SA COMPAGNE, Livre II, 7.

follows, and statistics prove, that among criminals the proportion of foreigners is always considerable. The same is true of prostitutes.

This sociological phenomenon may also be explained by other causes. The man who abandons his native soil to plant himself somewhere else is often one of those restless spirits satisfied by nothing, desirous to start some revolution against social institutions and to bring them into accord with his dreams. Often such a man is also a criminal, a bankrupt, or a deserter.

Hence it is not astonishing that these individuals, who have shown in their own country that they are incapable of obedience to authority, or of discipline, should carry away with them a spirit of insubordination and revolt. Even when they do not commit common and ordinary crime they find it easy to stir up mutiny, strikes, revolutions, and whenever the public peace is disturbed they take occasion to make it worse.

In order to deal with the menace of these dangers the government of Great Britain, theretofore celebrated among anarchists for its liberality and its hospitality, was forced to pass in 1905 its famous Aliens Act, which gave the necessary power to prevent dangerous foreigners from access to the country and to expel them if necessary.

No one should believe that I consider all foreigners as dangerous. My thought is quite otherwise. I simply say that among them there are always many who are disposed to join the army of criminals. But I also say that even those whose conduct is not opposed to the penal law should be the object of particular measures. We ought to remember that the more honest men are and the more they understand the duties of a good citizen, the less likely they will be to forget their obligation to their native land, merely because they have emigrated. We should infer that there is just cause to believe that they will help their own country by spying. It may be merely commercial and industrial. And many things of this kind have turned up both before and during the present war.

Before the war broke out there were many proprietors of hotels and restaurants, many servants, employees of business houses, workmen, even merchants, professors, and students, who abused the hospitality of the country where they were residing, to get every kind of information and every kind of secret to be put to some use in their native land. But even if they do not do this sort of thing

we ought to fear that any great number of foreigners would, by their presence alone, inevitably affect the traditions, habits, and virtues of the population with which they mix. A Swiss writer, taught by what has been passing before his eyes, expressed this thing profoundly in a single phrase when he said: "Foreigners are a denationalizing force." [5] This work of denationalizing is particularly to be feared in any nation which has been as rash as Switzerland or the United States. In those countries foreign professors are trusted to instruct the young. Whether it be children, more mature students, or even those in universities, the danger is the same. If the teacher does his work well he will be a man who cannot forget his native land. He will, therefore, teach ideas which are not those of the fathers and mothers of his students. These ideas will, in their turn, be a ferment causing denationalization.

We should then exclude entirely from our consideration the theory of jurists like Pillet and Rolin, who say that every foreigner should have, merely because he is a man, a legal right to enter every social and legal institution. We should, however, remind ourselves that every state has for its first cause of existence the interest of its citizens. Working from this idea we should declare that foreigners should receive every right which humanity demands for them, but that their rights should stop short of the point where native citizens begin to suffer. It is citizens who pay taxes and serve as soldiers; it is for them and through them that the state is organized. It necessarily follows and is the only just result that they should have advantages from which others should be excluded.

These considerations ought to inspire legislatures and govern in the future the condition of foreigners. Under such rules foreigners in every country will necessarily be more rigorously supervised in the future. There is more than one reason for this. Long before the war the thing had begun by reason of the inconvenience caused by the presence of certain foreigners, and legislation had begun to subject them to special rules. I have already cited the British Aliens Act. The world is familiar with the successive laws through which the United States of America has protected its population against the disagreeable results of immigration. In France for many years every man from every nation has had the most absolute

[5] Cernesson, REVUE DE PARIS (August 1, 1914), 530.

liberty. There has been but one distinction: the foreigner could be expelled. But the day finally came when our guests abused our hospitality. Some thirty years ago the behavior of the anarchists called our attention to the fact that both the authors and the inciters of acts of anarchy were generally foreigners. Then the decree of October 2, 1888, followed by the law of August 8, 1893, required foreigners residing in France to make a declaration to the police authorities and to carry papers which should be *visé*, in the commune to which they moved, each time that they changed their residence.

The war has shown that this was insufficient. Hence the decree of April 2, 1917, which requires every foreigner who remains more than fifteen days in France to receive a permit to remain, describing his person and carrying his photograph. In the United States the authorities have taken even greater precautions. Having used the Bertillon system to identify criminals they have completed the permits issued to German residents requiring on each the thumb print of the bearer. This is a wise course. Berlin had learned how to substitute one photograph for another on a passport, even when the first was impressed with a stamp.[6]

Doubtless after peace comes these measures will not be so strict. But in a general way they will probably continue, in view of the hard experience we have had. And that experience will probably lead to other measures interesting in private law. Some countries will forbid foreigners to own land or buildings. I think this interdict, which may already be found in certain countries, is not a wise thing. It is likely to drive foreigners out of fields of enterprise in which they might otherwise engage to the benefit of the country in question. On the other hand, it is of little value as a precaution. The foreigner who really has some dangerous scheme in his mind can accomplish it without much difficulty, either by leasing the thing he is forbidden to buy, or having it bought by a man of straw. The furthest I would go in this case would be to say that foreigners, as I have proposed in the case of foreign associations, should be forbidden to buy real property situated in places of military importance. Even such precautions are likely to be dodged without very much trouble by any skillful and unscrupulous person.

[6] 23 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (1916).

If we are to work along this line it would be much more practical to forbid foreigners to engage in public service or affairs which affect directly or indirectly the national defense. The laws of many countries require that the captain and officers of every ship shall be citizens. Others make the same regulations for railroad work. It is probable that the present experience will lead to the imitation of these examples.

For the same reason every public function ought to be prohibited to foreigners. As I write this I have received a profound shock upon learning that the mayor of an American city is an unnaturalized German.[7]

I prefer the wiser French law, which absolutely refuses every kind of public function to foreigners. They may not become members of the bar. And that is reasonable, for the influence of a lawyer may be most considerable, and he is a man likely to be trusted with secrets of great importance. Lawyers ought to be held up in their respect toward the duties of their profession by the very same moral considerations of which I have spoken above and which are always more forcible in the case of native citizens.[8]

The next question is whether other restrictions are needed upon the rights to be granted to and enjoyed by foreigners. I say no. As I have already observed, the more reasonable we think it is to take measures against dangerous foreign influences, the more we see how reasonable it is and how economically necessary that we should not put up barriers like the Great Wall of China which would block off ordinary international relations. That sort of thing is both disagreeable and injurious to the very people whom it seeks to protect.

Beyond all these matters there is a whole series of new problems which have been brought before jurists because of the progress of scientists. These arise out of those scientific inventions which the war has turned from theory to practice. The application and development of such things go far beyond the dreams of romance. Thus, when peace comes again between nations, even when it is more complete than it ever was before, we must profit by the

[7] The American newspapers have published the fact that a suit was brought in the District Court of Indianapolis to prevent a German named Fred C. Miller from assuming office, January 7, 1918, as the Mayor of Michigan City.

[8] See, on this subject, my MANUAL, § 333.

lessons of war and regulate severely aërial navigation, wireless telegraphy, and submarines, including those for commercial purposes. Here we have questions which interest both public and private international law, questions of the greater interest because of the difficulty of any present solution. Yet as none of them can be seriously studied unless we begin with research and meditation, I can merely announce the problems.

III. Conflict of Laws

It is usual to employ the expression "conflict of laws" to indicate the cases in which it is necessary to decide whether a legal relation is to be governed by the law of the country in which the question arises or by the law of some other country. This phrase has been deservedly criticized. Literally understood it would make one believe that in cases of this sort two laws engaged in a controversy, each one possessing the same authority and the judge intervening, like a sort of arbiter, to award the victory. Truly there are jurists who conceive of things in this light, but I am one of those who consider it a most inexact conception. In reality in every country there is but one law, its own. Nevertheless there are cases in which that law may declare that on particular points the rules to be followed are those enacted by a foreign legislature. This may arise from reasons of practical utility, of courtesy toward other nations, or of plain justice. When this happens there is no conflict between the local law and the foreign law. The first borrows from the arrangements made by the second. If I may make a somewhat trivial comparison, it is as if a host inviting strangers to his table should think himself bound to serve up to them dishes prepared according to the usage of their own country, not because he is bound to do this, but to be agreeable to them, or perhaps to conserve their health.

The expression "conflict of laws" is therefore inexact. But it is most useful, and it has not been possible up to the present time to find another which denotes under so brief a phrase the case in which the presence of a foreign element in a legal relation may require the application to this relation of some foreign rule. Thus it is improbable that any transformation of judicial theory, such as present events may bring forth, will carry with it any abandon-

ment of this expression and, conforming to common usage, I shall continue to make it serve me.

But even if this expression is likely to continue to be honored, nevertheless there is reason to think that the problem which it expresses will receive new and different solutions, after the general peace, very different from those which have been given to it in the past.

At first sight this suggestion is a surprising one. How can one suppose that a gigantic battle, such as we now witness, can exercise any influence whatsoever on the conflict of private laws when that conflict, as has just been said, is not a real controversy? Once peaceful relations have been restored between those states now at war, why should not the inter-relation of their citizens be governed by the same rules as in the past? To this I answer: The actual war has rolled forward under atrocious conditions. It will leave profound and painful marks on the souls of millions of men and women who have suffered through it. These are people who were confident in the theory inspired by Rousseau,[9] a theory admitted and taught in all continental Europe. They had been led to believe that if war should break out the evils which follow in its train would touch civilians only indirectly and, as it were, by rebound. All the world knows that there has been nothing of this sort. Following on the German brutality, great populations have been forced to undergo physical and moral suffering a hundred times worse than that of the soldiers. The national dignity of the Belgians has seen their territory invaded by one of the guarantors of their neutrality. Their goods have been sacked and pillaged; they have suffered in their most dear affections by the massacre of so many innocent victims, by so much rapine and sacrilege that an honest pen cannot describe it. They have suffered by having all their youth shackled in a most degrading physical slavery. Can one then believe that they will be in a hurry to forget the authors of such evils?

And the English: Will they not remember, when peace comes, the women and children whose death has been the subject of

[9] "*La guerre n'est point une relation d'homme à homme, mais une relation d'État à État, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats.*" (CONTRAT SOCIAL, Livre I, chap. 4.)

celebrations and public rejoicings? Can they forget the enthusiasm with which Germany welcomed the exploits of its submarines against passenger steamers and those of its Zeppelins against unfortified towns? How many years will Serbia need to get back to normal life? And there is France, which wanted nothing but peace, which had lulled itself to sleep with generous ideas of international fraternity. Can France ever forget the attempt on her very life? Can she forget the millions of her men folk who have been sacrificed to save her from destruction? Above all, can she forget the stupid barbarity directed against her most respected monuments, her most feeble and frail beings, her greatest artistic glory, and against the apple trees which adorned her gardens?

Peace will come. At some time it must come, but at the bottom of hearts hate will remain. It will be a long time before Turks, Germans, Austrians, and Bulgarians can make themselves tolerable as visitors to the victim nations.

The legislation which in all countries reflects the current of popular opinion will feel a fatal necessity to follow its tendencies. Laws and decisions will accentuate the differences which exist today between citizens and foreigners; on the other hand treaties will diminish these same differences in the relations among the Allies.

Can it be possible that in the future the German will receive in France the same rights and privileges as an Englishman or an American? I have spoken of this above, but I now return to the question to point out a consequence which follows from it when we consider the future rules about conflict of laws.

From the time of Bartolus everyone has admitted that cases exist in which the law governing a legal relation is the personal law of the individuals who are interested. But when we begin to give precision to the idea of personal law, discord breaks out between systems of legislation. Some, faithful to the ancient theory of *statuts*, consider the personal law of an individual to be that of his domicile. This is especially true in England and in the United States. Other systems take their inspiration from the principle laid down by article 3, section 3, of the *Code Napoléon*, and apply to each individual the law of his nation. Most of continental Europe has adopted the French rule.

The progressive extension of this second theory is an argument

in favor of its merit. In particular, this theory has the advantage of being easier to apply with precision than the older one.[10]

And even in internal relations it is not always easy to give precision to domicile. Often and especially in our time where people move about according to their occupations, their caprice, or even the weather, it may well be embarrassing to decide what country is the principal residence of the person with whom one is dealing. Moreover an individual may often change his domicile easily and without leaving any clear evidence of what he has done.[11]

On the contrary, it is generally easy to be sure of the nationality of an individual. In the future it will be even simpler if, as I have thought likely, the law of most countries will require more and more evidence from the foreigner. It is probable that he will be required to make a declaration to the local authorieties and to receive a permit to remain, which declares his nationality. Further, all contests about the nationality of individuals, no matter how frequent we may think they are likely to be, are in reality the reverse of frequent if we consider how many millions of individuals have a nationality not open to dispute. And finally, the number of those who change their nationality is relatively unimportant. Even among those the change is accomplished in practically every case by formalities which give it sufficient publicity.

But from now on it seems to me we shall have one further reason for preferring nationality to domicile. As I have said, we cannot possibly treat a German, after this war, in England or America, as if he were a citizen. It will not be enough that he is domiciled there. We cannot even treat him like an ordinary foreigner. By reason of his nation we shall subject him to certain special police measures and we shall refuse him certain rights. Now if, in the future, law draws this distinction, must it not also be prepared to

[10] Mr. T. Baty has published an interesting and original work under the title of POLARIZED LAW (1914). He has endeavored to prove that the rule of domicile is superior to that of nationality (pages 18 *ff.*). But the cases which he cites to support this thesis [Mette *v.* Mette, 1 S. & T. 416 (1859); Ogden *v.* Ogden, [1908] P. 46; and Sussex Peerage Case, Cl. & F. 85 (1844)] are really against it. They indicate that the application of the law of domicile causes difficulties and injustice which would not be produced by the law of nationality.

[11] I may further add that since systems of legislation do not agree upon the determination of domicile, a person is likely to be considered by an English court as domiciled in France when the French court would consider the same person to be domiciled in England. See my MANUAL, § 114.

take nationality adequately into account when it starts to determine the manner in which this German may exercise such rights as are granted to him? There would be an evident contradiction if we should consider nationality to know whether a man may acquire one piece of property or another, or sue, or have the benefit of a treaty, and if we should neglect it when we came to determine the conditions to be imposed upon his acquisition of property, his rights in the courts, or his advantages under a treaty. Thus it seems to me that in the nature of things those countries which until now have remained faithful to the idea of domicile will be forced to accept the other theory as put forward by the authors of the *Code Napoléon*, because it is the one which suits modern conditions. Great Britain has already made one step in this direction. Her Trading with the Enemy Statute of 1916 abandons the traditional principle of English law. Before that statute, even in time of war, the question of whether a person was an ally, an enemy, or a neutral depended upon domicile. Now the criterion is nationality. Sir Edward Grey, as Minister of Foreign Affairs, in a letter to the Ambassador of the United States of America explaining this measure says: "The former test of domicile has been shown by experience to be insufficient in view of the conditions under which modern business is done."

And this is true. In our time the nationality of persons has acquired such importance that it must necessarily replace domicile as a test in international relations. Of course it will still be possible to consider domicile in all proper cases. But those will be the exception, and there is every reason to believe that the Anglo-Saxon nations, taught by current experience, will follow the example of the Latin nations. Soon they will have to recognize that nationality is a necessary test and to decide what law to apply to each foreigner according as he is friendly or hostile.

This will be more necessary, and uniformity among nations will also be more necessary if the jurists realize their hope that private international law will make new progress through the conclusion of many international conventions. These conventions are useful only to the citizens and subjects of the states which have made them, and this is just one more reason for the theory of nationality. For everyone who relies on any such convention will have to prove his nationality.

The next thing to consider is whether there is good reason to hope that new international conventions will improve private international law and in what respect the world war is likely to have an influence in this connection. Its principal influence just now flows from the circumstance that many treaties relating to private rights have lost their force with the outbreak of war. This is particularly true of the relations between France and Italy on one side and Germany and Austria on the other side. Are these treaties suspended or did they come to an end? The question is premature and will doubtless be settled in the treaty of peace.

But even if that should not be, I am driven to believe that all those conventions must be considered dead. Germany violated the treaty which guaranteed the neutrality of Belgium. Turkey tore up the Capitulations. The Central Powers trampled under foot all arrangements intended to diminish the horrors of war. What was this but a proclamation of an intention to be free from such engagements? What dupes other nations would be if they should let such enemies choose among conventions and pick those which they like and which are to their advantage! Surely the just and logical course is to declare that all are dead letters.[12]

But that is a secondary question. The principal thing, as I have already said, is to inquire whether civilized states ought to set to work again to establish whole series of conventions like those in force before the war and to govern questions of private international law by such conventions to as great an extent as is possible. I confess that I cannot share the enthusiasm which has been expressed by many international lawyers. Experience ought to have destroyed their illusions. There are so many cases in which the existence of a convention causes more complications instead of solving the questions toward which it is directed.[13] Take the French-Swiss treaty of 1869. It was intended to suppress all conflict of law upon a whole series of questions of civil right and legal comity. But it has given rise to no end of litigation in both countries. This

[12] This opinion has been expressed in Germany by Professor Eltzbacher in his very recent book TOTES UND LEBENDES VÖLKERRECHT (1917). But it should be observed that in the relations between France and Germany the convention relative to the protection of the rights of authors has been respected. 13 REVUE DE DROIT INTERNATIONAL PRIVÉ, 370 (1917).

[13] Compare the just reflections on this subject of Professor Pillet in his book on CONVENTIONS INTERNATIONALES, 9 (1913).

is proved both by the volumes of reports and particularly by the evidence in the *Journal du Droit International Privé.*

This is not all. It is well known that for some time past representatives of the principal nations of continental Europe have met periodically at The Hague to draw up plans for international arrangements. The idea has been to cause a progressive disappearance of conflicts between the laws of the countries which share in these arrangements. Many of these conventions had already been signed. Some had begun to be put into effect. But then (and it was some months before the war), France, which had cordially welcomed the general idea, denounced these treaties, one after another, leaving in effect only the convention upon certain matters of procedure.

The reasons which led the French government to this action are not clearly understood. Probably it was caused by the following considerations. When a convention between two countries regulates the manner in which a right shall be exercised, the result is that each one of these countries deals with a controversy differently, according as it arises in the case of subjects of the other contracting power or arises in the case of other persons. The result is that private individuals, lawyers, and courts are exposed to a dangerous trap; one may easily forget the conventions, and the results of forgetfulness are unpleasant. This inconvenience is particularly serious when one country makes a number of conventions on the same subject with several other foreign nations. Then one must know first whether to apply the law of the country or of the treaty, and beyond that one must know which treaty is to be consulted. And for the latter purpose one must, to act with certainty, determine at his own risk the nationality of the parties.

It is true that this inconvenience is less when a single convention binds a number of nations, as in the case of The Hague Conventions. But then a different sort of inconvenience arises. In order to make a general international arrangement it is necessary that the convention which expresses it shall not be too seriously out of tune with the essential principles of the laws of any one of the contracting parties. When the supernumeraries in a theatre are supplied with costumes, it is not possible to make them fit in each case, since the wearer is likely to change at every performance. One may well expect them to be too large or too small, and we know what a

grotesque result we see on such occasions. The same is true of a legislative text. If it is to be used in several countries it is almost necessarily vague. Then the convention does not give sufficiently definite answers, and the very absence of precision leads to resort to the courts. It brings about the very suits which the convention was to prevent, and it is likely to cause different interpretation of the text in the different countries. Before long things are likely to be in about the same condition as if the treaty had not been made.

A notable example of this is The Hague Convention upon the signification of judicial acts. Although it was redrafted in July, 1905, from its first form of 1896, I may fairly say that even now it scarcely improves the previous conditions and that, on the other hand, it has raised some difficult questions of interpretation.[14]

Another sort of inconvenience is likely to result from these conventions common to several nations. One country is likely to push forward its own judicial system. There is good reason for fearing this, and if it happens the traditional institutions of other countries are likely to be upset, although those institutions are probably the things which fit the historical development and practical needs of those other countries. This would surely have happened if the plan for a uniform law of negotiable instruments had been adopted. The representatives of thirty-two nations worked on this at The Hague for several years, and it would probably have been adopted had it not been for the outbreak of the war. But that would have been a German victory; for this draft was thoroughly permeated with the ideas of German jurists and commercial men, the ideas embodied in German legislation on this subject. Then German merchants would for several years have reaped a very substantial harvest in other countries. Those other countries would have been obliged to go to school to the new order of things, and while they were learning there would have been disorder in their commerce, their industry, and their credit establishments.

Thus, notwithstanding the way in which this draft was expressed by men of theory, practical men in French Chambers of Commerce rightly criticized it, and public opinion, now enlightened upon the dangers and effects of German penetration, should set itself against any revival of this scheme.[15]

[14] See my MANUAL OF PRIVATE INTERNATIONAL LAW, § 539.

[15] For the bibliography, see my MANUAL, § 197.

And lastly, if we have a general treaty relative to the manner in which private rights are to be exercised, one consequence is likely to be that upon certain points the courts of each one of the contracting states will give the language a different interpretation. If this happens, the treaty will multiply difficulties instead of reducing them. There is too much ground to believe that this will happen; if so, the more the countries, the more the international discord.

These are the different reasons which make me think that we ought to give up in the future the making of general international conventions intended to diminish the conflict of laws. That is one of the lessons of the war. But I do not draw the conclusion that we ought to give up dealing with the questions of private international law.

Certain sorts of conventions about them will still be desirable means of solving questions which can only be dealt with by agreement between nations. One of these questions is the determination of the rights which will reciprocally be given to the subjects of the contracting parties. I have already pointed out the objections to any provision that strangers may exercise special rights in an unusual way. The result of that is that certain persons within a given territory are not subject to general law. Such conventions may even cause a situation like that in the countries which have Capitulations,[16] and that would be a serious matter. On the other hand there is no like objection when an international treaty authorizes the subject of one country to enjoy certain normal rights of the citizens of another country. There one does no more than remove inequality. By doing so analogous concessions can be obtained in the other nation which makes the agreement.[17]

It is easy to see that there is an essential difference between conventions which grant to foreigners the enjoyment of certain usual rights and others which say in what manner rights shall be exercised in cases of private international law. The latter necessarily replace the ordinary rules of law. Thus something which a

[16] In a country of Capitulations each person obeys only the law of his nation. He may even be free from all but the law of his race or that of his religious body.

[17] It is interesting to remember that more than a century ago article 11 of our Civil Code provided for this system of diplomatic reciprocity.

Parliament has voted after debate and after full discussion may be replaced by clauses drafted by diplomatic representatives which no legislature has had a chance to consider, ratify, or reject. Why should one be surprised that conventions of this kind result in the sort of inconvenience which I have indicated? On the other hand, in dealing with a convention which grants to foreigners the usual rights of citizens, those who sign it really act as the agents of their own country to grant rights already available, and it is not likely that any trouble or any interference with the normal working of legal institutions will follow. Another advantage worth remarking is that conventions which grant such usual rights cause very little interference with private persons. Such conventions merely make foreigners better off, and that is the proper rôle of diplomacy which seeks to protect the interests which it represents.

Like reasons make it desirable that more and more conventions should be made upon the question of nationality. Such conventions deal entirely with international points. They cannot interfere with the working of domestic institutions. Indeed, such conventions are properly the business of the state, for it is the state which is particularly interested to know what persons owe allegiance to it. And so I believe that no matter how many of such conventions we have, it will only be in the rarest of cases that we shall have trouble over the question of what nation claims a subject or whether a man is free from any national tie. Now, since the world war has introduced military service almost everywhere, since notwithstanding all dreams about a league of nations for peace there is good reason to believe that some new catastrophe may come to set people against people, and since even the present war is likely to continue in the economic field, we have more reason than ever to take precautions against conflicts in the matter of nationality. The so-called Bancroft treaties of the United States of America and others like them have had most happy results along these lines in the relations of that country with more than one foreign power.

But I submit that each treaty of this class ought to set up an international tribunal, composed of delegates from both countries and with a neutral umpire, which should consider all cases of the application of the treaty. Thus we should avoid conflicts in interpretation such as are only too likely to arise when the courts of

each of the states deal with the same treaty, conflicts which merely create new difficulties in place of old ones.[18]

I am thus led to consider the question whether we should not look forward in a general way to the establishment of international tribunals which should consider every sort of lawsuit depending upon any question of private international law. This is a most seducing notion of long standing. It is pleasant to dream of having questions settled by impartial tribunals presided over by judges skilled in the subject under review. One can think that the decisions of such an authority would be respected everywhere and that they will put an end to the present scandal of conflicting decisions. The thought will be that these become conflicting merely because they are the judgments of courts in different countries. When one meets such decisions one is likely to exclaim with Pascal: "Truth this side of the Pyrenees, error the other."

But I fear that those who support this beautiful dream have not reflected sufficiently upon the obstacles which stand in the way of realizing it. There is one of these obstacles which seems to me practically fatal, for it depends upon the very nature of the institution which is proposed. Such international courts, obviously, could only be set up in small number. Hence their sittings would probably take place far from the domicile of the parties; it would follow that if either party were poor, or if the subject of litigation was not of money importance, the duty to appear before a distant court and the necessity of employing advocates and pleaders who understand that court would be too burdensome. Justice would then be sold at too high a price or denied, and each would be as bad as the other. In France this very inconvenience is bad enough when a case is appealed to the Court of Cassation, and the same is true in like case in other countries. But that sort of thing does not happen very often, and moreover when it does, the case has already been dealt with by an inferior tribunal and very likely an intermediate tribunal. It gets in a sense digested and sufficient light is thrown upon the questions which the supreme tribunal is to

[18] For the differences of interpretation between the German and the American authorities on the subject of the Bancroft treaties, see BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, 240 (1915). For remarks on the conventions about nationality made by France, see my MANUAL, §§ 214–16, 260.

decide. There is little reason to fear that the latter will not comprehend the arguments.

It is quite another thing to set up a court of the first instance for suits depending upon private international law. Such a court would take up a divorce suit brought by a poor workman. A Greek might sue a Russian for a few hundred francs. Someone in Syria might sell merchandise of small value to someone in Norway. No matter how the litigation arose, it is reasonable to suppose that in any one of these cases the person who wanted justice would give it up rather than resort to a distant tribunal. Now there is a grave moral objection when any right is made dependent on difficulties of this kind. The social objection is at least as great. I mean that the masses are likely to be excited against the classes and made particularly bitter if they get the idea that it is not possible for the common people to get justice. And this is especially true when a poor man gets into court against a rich adversary.[19]

Hence I conclude that maritime affairs are about the only class suitable for an international tribunal or jurisdiction. The ordinary maritime suit is generally a matter of some importance, and the parties to it generally have both money resources and a knowledge of how to do their business. There is another reason why if we set up any international tribunal we should confine its activity to this class of cases. Maritime law in all countries has a general resemblance. In no other division of either law or legislation have different nations borrowed so much from each other. Hence the task of an international tribunal would be relatively easy. But if we take up any other kind of business we find for converse reasons very serious obstacles to such tribunals. For instance, what legislation or system of private law is one to apply? That problem is insoluble unless all the nations should join in one common code of private rights, which in turn is not a reasonable notion. Even where they have mixed tribunals, as in Egypt, those tribunals apply only the Egyptian law and have a very limited competence.

And finally if we should wait for such a court before we started to better the situation of private international law we should certainly have to wait until the Greek Calends. Just think of

[19] *Cf.* those statutes of the Roman Emperors which forbade the assignment of causes of action to rich or powerful persons. (*Ne liceat potentioribus patrocinium litigantibus protestare*, CODE JUSTINIAN, Book II, Tit. 14.)

the conferences and the various deliberative assemblies and legislatures which would have to be consulted before any valuable or definite agreement could be reached!

For these reasons it seems to me that the present difficulties of international law are more likely to respond to the private efforts of individuals. Generally speaking, wherever the state has interfered it has been slow and clumsy and unskilled.

When peace is restored and the world begins to live in quiet and without trouble there will be two methods by which men skilled in this sort of thing through their life or profession will be able to do something toward removing the difficulties which stand in the way of juridical acts which are to have a consequence beyond the limits of the territory where they are executed. The first of these will be the development of what is called an arbitration clause. I mean the ordinary stipulation in a contract which provides that differences arising out of it shall not be submitted to a court but to one or more umpires chosen by the contracting parties. Article 1006 of the French Code of Civil Procedure denies validity to these clauses, and the same is true of Italian law. I do not think there is any serious justification for this denial and it ought to disappear from the law in which it is found. If that happens these clauses will come into greater use and very considerable advantage should result. The length and expense of ordinary procedure can be avoided. There will never be any occasion to discuss the jurisdiction, a question upon which so much time is often wasted, before the case reaches any discussion of the merits. And these are the principal causes of the problems which private international law has to solve.

The weak side of this proposal is that it can only be applied to contracts, practically only to commercial contracts. But there are other fields for the same idea. Generally speaking, almost all the juridical acts which a man does of his own free will can be helped by another procedure. It is possible to diminish the frequency of conflicts of laws upon such matters by a plan which is not new but which has so far been seldom employed. This is merely that one should state in each juridical act, whether it be a contract, a will, or a marriage, that it is to be governed by the legislation of a specific country. One can easily know in advance when such an act is one likely to be called in question in a foreign country or deals with the rights of persons of different nationalities. And if in such

cases this precaution should be taken it certainly would avoid a great number of lawsuits; I mean the suits which turn upon the law of the personality of the individuals interested in the act. Or it may be the law of the place where the contract has been made or that of the place of performance. No one will contest the substantial advantage which would follow from an extensive application of what I may call the principle of the autonomy of the free will. And what do we need before we can accomplish this? Nothing, except that the lawyers who draw wills, contracts, gifts, and other like acts should acquire the habit of inserting in their documents this which I call the clause of legislative competence.

In France and I believe in other countries it is common to provide in such an act that any dispute about it shall come before a specified court designated in advance. Now as clauses like this are common and current why should we not give equal currency to those which state with precision and in advance the law applicable to the act itself?

The more people study private international law the more this hope of mine will stand a chance of being realized. One thing is sure: this branch of the law did not receive serious or scientific attention up to about fifty years ago. And in many cases the questions which arise within its field have become complicated, and indeed have arisen at all only because of the ignorance and insufficient skill of the interested parties or their lawyers or the judges who rule their acts. The better private international law is known the more simple it will become. I have just given one proof of this in my proposal about legislative competence, but I believe that what I say about simplicity is broadly and absolutely true.

From this point of view it would seem to me probable that the war may have one happy consequence. More than once in this study I have pointed out the general mixture of men of all nations, the increase of international contracts, and the conflicts of interest which have been caused by this great war. These in turn will cause a great number of controversies over private international law. That division of our science will in consequence attract the attention of lawyers more than ever before, and from this will come progress which may be very fertile.

There is more to this line of thought. Although I have no great confidence in the effect of international conventions, and although

I have felt bound to say much the same thing about the aspirations and drafts of congresses and associations of lawyers, I have for long believed that we have great benefits to expect from the relations among men which are brought about by such congresses, reunions, and meetings to draft treaties. Here we have people distinguished by their education, by their knowledge of the world and their social condition. Many of them have served in legislatures, others are lawyers, professors, and judges. Still others are leading merchants, bankers, or manufacturers. When these people meet and exchange ideas each teaches the others both the institutions and the necessities of his own nation, and the instruction is much more vivid than anything which can be communicated by books or articles in reviews. And when these men go home they cannot help sowing this seed of foreign origin, and if that seed falls upon a fertile soil something grows which means progress.

Moreover, the better one understands any foreign legislation, the greater the possibility that one can borrow some good legal institution from it. Something of this sort may be lacking in a country and it may be plainly worth adopting. This phenomenon is of frequent occurrence. Let me cite the numerous codes which were modeled on the *Code Napoléon* and conversely the different French laws about checks, warrants, and other commercial devices which have been passed in imitation of good English legislation. Everything drives one to believe that the reciprocal penetration of thought will multiply this borrowing and lending between systems of legislation.

There are many distinctions today between the laws of different countries which are bound to grow less for such reasons as these. Before long we may see general principles established and admitted nearly everywhere and resulting in something like the *jus gentium* of other days, that system of rules in force throughout the entire Roman Empire.

Now at the present time many of the problems of private international law arise out of the differences between the legislation of different countries. Suppose that English law should admit of the adoption of children, should permit natural children to be made legitimate and spendthrifts to be put under guardianship. Then certain lawsuits would disappear. I mean lawsuits which now arise both in British courts and Roman law courts out of the

circumstance that the one system possesses and the other does not possess these provisions.

And then just think of the many and most objectionable lawsuits which would be avoided if the validity of marriage was everywhere regulated by the same conditions. Perhaps it would be too much to suggest that divorce should be granted in every country for the same reasons. Litigation on these subjects is not only bad in itself, but bad because of the family and social troubles which follow on it.

Now the influence of the present war upon these subjects may be a happy one. On the one hand it separates, on the other hand it brings nearer together. Think of the different people who have come from the ends of the earth to fight on the soil of my country. Against the common enemy of law, liberty, and beauty we have true crusaders arrayed as truly as in the days of Peter the Hermit, and these men come from every class; merchants, lawyers, manufacturers, magistrates, bankers, and statesmen may all be found. And when they take their intervals of rest, it is likely that each will teach the others. All will see and hear and understand about the customs and morals and institutions and even the legal organization of France and Italy where they do their bit. Now if there is anything in what I have said about the value of the casual relationships between men who go to an international congress of the ordinary sort, if such things as that have had a beneficial influence on international law, am I a dreamer if I believe that much more valuable results will flow from the continued presence of such allies on our territory? There is at least good ground for this hope. We, on our part, are already going to school to our visitors. We ask them questions on all the things that are not answered in books and we grasp with avidity the opportunity to learn, especially because it is presented at the same time that we enjoy the pleasure of being hospitable.

One thing of this sort has already been accomplished: a few months ago the French and the Italian jurists formed an association intended to promote uniformity of civil and commercial law in those countries. And a similar attempt ought to be made in some general way to bring together all the Allies and help them to be allies in the future. May we not even hope to throw a bridge across the gulf between Anglo-Saxon and Roman law?

The best way to build up anything of this kind would be, I think, to start the publication of something in the nature of a review of comparative jurisprudence. There are some reviews, illustrated by the example in France of the *Journal du Droit International* and the *Revue du Droit International Privé*, which sometimes publish decisions of foreign courts, even when those decisions do not deal with international questions. But when they do that they go out of their province, and they do it very little in any case. On the other side the publications of our *Société de Législation Comparée* and of other like societies in other countries do very little to enlighten their readers. They print practically nothing but the text of statutes. They throw no light on how things work. But no one can fairly say that you can get any notion of what the law of a country is by reading texts in books. The result is a little like looking through one of those lenses which slightly distort the objects which at the same time they bring nearer to the eye. If we want to understand foreign law in the sense of having any concrete notions about it, we must do what corresponds to touching the object which cannot be properly seen through a glass. And the only practical way to get in touch with operation of laws is to study the decisions which apply them.

And so I say that a review of comparative jurisprudence is needed and would render great service to the international progress of law. Such a scheme would need a committee of jurists in each nation. They should choose the characteristic decisions of their courts. Then these decisions should be translated into the language used by the review. This sort of translation must be done by people who really understand how to translate legal ideas. And beyond that it would be practically necessary to annotate each one of these decisions, and such annotation requires some skill.

It seems to me that those who are interested in the theory or practice of law, and particularly international law, might well applaud any realization of this plan. It would make it easier to know and understand foreign legislation, and that would contribute to the prevention of conflicts of law. For fairly often such conflicts arise from the application of foreign law in error. A French tribunal may divorce Irish persons who, being Catholics, are bound by the law of indissolubility of marriage. Parties contracting in England may grant a right or easement in some piece of real prop-

erty situated in France, such as is not recognized by French law. Then neither the decree of divorce nor the grant can have any effect in the country where it is intended to operate. This sort of error, however, would probably be patent as soon as any court had passed on it. And the whole thing could have been avoided if there had been greater legal skill on the part of the persons who believed that they knew the Irish law, or how to apply the French law, in the cases cited.

The moving about of individuals which will be caused by military operations is likely to contribute to the exchange of knowledge and the comparison of law. Sometimes it will cause a case of conflict. Sometimes it will make the solution easier. Sometimes it will prevent conflict. But these are not the only results which we may well expect from the new contacts among nations brought about by our fight against German dominion and our league to combat it. There will be at least one other. Today when a question of private international law arises in any country, whether before the legislature or before the courts, very often the elements of the decision are to be found in what I might well call international custom or European common law. I mean the general body of rules, often founded on the Roman law, always based on common sense, justice, and practical necessity, which have been worked out in the course of the past centuries and which have become so familiar that practically no one denies them.[20]

The community of sentiment, of aspiration, and of life, which has been established among the states comprising the Entente, will certainly widen the scope and power of this international custom. *Eadem velle atque nolle, hoc est vera amicitia* is the true and forcible saying of a great Roman historian. Therefore, all the Entente states ought to try to solve their problems of this kind along similar lines, and some community of thought ought to be a necessary consequence of their alliance. We may forecast, from the close relations which have been established among them, not only a tendency of their legislation to borrow freely when good things are found and thus to diminish differences, but also an increasing tendency towards harmony, especially towards harmony in the decision of points of private international law. If this happens, there will follow a system much more satisfactory than any which

[20] See my MANUAL, § 12.

can be established by treaties, for it will be more supple. Then it will adapt itself to situations and to the needs and institutions of the different countries, and so the inconvenience of handling and of interpreting an international treaty is likely to be avoided.

The countryside rarely appears more smiling than after a violent storm. Black clouds cover the heaven and darken the earth; torrents of rain fall and seem to threaten a new deluge; the wind cries, the thunder sounds, and the lightning glares and fills the souls of men with fear. Then comes the sun again, and under his rays the sea, the plains, and the mountains take on a new appearance; the foliage becomes deliciously fresh, the air with marvelous limpidity lets one see far off the very smallest details of the picture laid before our happy eyes. The birds begin to sing again and the farmer turns to his toil. So on the day when our great tragedy, already four years long, in which every citizen of the world has played a part, comes to the end of its final act, humanity will commence a new era. If the battle between the nations is not followed by domestic strife, if we learn from hard experience the lesson which it can teach us, our human atmosphere will have been purified by so much blood and heroism that we ought to be able to see better than ever before the road which we wish to travel to lead civilization to new and important fields of progress.

And I hope that private international law will at least be one of the branches of human activity on which the war will have this beneficent effect. The considerations which I have submitted to my readers seem to me to give fair ground for this prophecy and this hope.[21]

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[21] Translated by Richard W. Hale, Boston.